RECEIVED
MAR 31 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Closed Captioning and Video Description of Video Programming	)	
	)	MM Docket No. 95-176
Implementation of Section 305 of the Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Its Attorneys

March 31, 1997

No. of Copies rec'd 026
List ABCDE

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Closed Captioning and Video Description of Video Programming	)	
	)	MM Docket No. 95-176
Implementation of Section 305 of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF TELE-COMMUNICATIONS INC.

Tele-Communications, Inc. ("TCI") hereby submits its reply comments in the above-captioned proceeding.

I. INTRODUCTION

In these reply comments, TCI addresses two points:

- The Commission should not impose liability on video program providers where the ability to caption the programming is outside the control of the provider.
- The Commission should exempt public, educational, and governmental programming ("PEG") from any closed captioning requirements adopted in this proceeding.

II. THE COMMISSION SHOULD NOT IMPOSE LIABILITY FOR CLOSED CAPTIONING ON A VIDEO PROGRAM PROVIDER WHERE THE ABILITY TO CAPTION IS OUTSIDE THE CONTROL OF THE PROVIDER.

A number of parties submitting comments in this proceeding supported the closed captioning of programming services, noting that captioning "offers significant benefits to a large segment of the American public."[1] However, some parties expressly premised their support on the condition that the Commission impose on program providers, such as cable operators, the legal liability to ensure captioning.[2]

Imposing legal liability for captioning on a program provider is an extraordinary concept, considering that the provider: 1) does not own the programming; and 2) has no legal authority to require that a programming service be captioned (indeed, as demonstrated below, in most cases providers are contractually prohibited from captioning the programming). In other words, captioning is entirely beyond the control of the program provider.

Some parties argued that legal liability should be placed on program providers because the Commission does not have jurisdiction over program owners. While this point is generally correct, it is not compelled in the case of the closed captioning requirements of Section 713. Section 713(b)(1) only requires that video programming first published or exhibited after the effective date of the Commission's regulations be fully accessible through the provision of closed captions, without

---

[1] Comments of Motion Picture Association of America ("MPAA") at 2; see also Comments of Association of Late-Deafened Adults at 1; Comments of Captivision at 1.

[2] See MPAA Comments at 2-6; Comments of C-SPAN I and C-SPAN II at 6-7.

specifying whether the program owner or the program provider should be responsible for ensuring captioning. In fact, in Section 713(b)(2) -- the only place in the statute which does assign responsibility for captioning (in this case for programming first exhibited prior to the rules) -- Congress placed the burden on both program providers and owners.[3] Moreover, in the legislative history to Section 713 Congress specifically "recognized that captioning at the production stage is often the most economical and efficient means of compliance with the closed captioning requirements."[4]

It is illogical to suggest that Congress found that captioning is most efficiently accomplished at the program production stage and at the same time intended the Commission to impose full liability for captioning on video providers. However, as discussed below, if the Commission decides to impose liability on video providers, it must recognize the complexities inherent in such an approach and adopt mitigating regulations.

---

3 Section 713(b)(2) requires that "video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of [the Commission's] regulations ...." (emphasis added). The Commission expressly recognized this fact in the Notice. See Notice at ¶ 26.

4 H.R. Report 104-204, 104th Cong., 1st Sess. 114 (1995)("House Report").

Imposing unmitigated liability on program providers for actions beyond their control would disrupt the negotiating dynamics between providers and programmers, resulting in marketplace distortions that ultimately would reduce consumer welfare.[5] This is because providers essentially would have to ask the programmer to caption its programming under circumstances in which the programmer has no duty to caption, but knows that the provider has a legal obligation to ensure that the service is captioned. In many cases, this would place the provider in a position in which its ability to comply with both the law and its contractual obligations is dictated by another party and is outside the control of the provider. For example, consider a provider that has a contract that requires it to carry a programming service and that the contract has five years remaining. If the programmer refuses to caption, the provider has two choices: 1) drop the programming service and thereby violate the terms of its contract with the programmer; or 2) continue to carry the programming service and thereby violate the Commission's closed captioning regulations.

Under these circumstances, the programmer could use the leverage conferred upon it by the captioning rules to demand

---

[5] In its comments, MPAA cites "market distortions" as a basis for the Commission to avoid placing closed captioning requirements on program owners. MPAA Comments at 4.

unrelated concessions from the provider. For example, the programmer could agree to caption only if the provider agrees to increase its programming license fee payments, carry a second service offered by the programmer, or reposition the programmer's service on a more favorable tier.

In order to avoid this type of market distortion, the Commission should clarify that program providers have no liability for captioning programming subject to contracts that pre-existed its regulations until such time as these contracts expire. In addition, the Commission could cure the problem inherent in any scheme that places liability on providers for the failure of program owners to caption by requiring program owners to indemnify providers for any captioning liability they incur. At any rate, the Commission should make clear that a finding of liability under the closed captioning rules does not justify non-renewal of a cable franchise under Section 626(c)(1)(A) of the Communications Act for failure to comply with "applicable law."[6] The drastic penalty of non-renewal is entirely inappropriate in situations where the ability to comply with applicable law is outside the control of the cable operator.

In effect, the statement in the Notice that program providers "are in the best position to ensure" captioning because

---

[6] 47 U.S.C. § 546(c)(1)(A).

they "can refuse to purchase programming that is not closed captioned" rests on a faulty premise. The Commission cannot assume that the provider will (or, more importantly, can) simply exercise its leverage over the programmer to force the programmer to caption. As demonstrated, the provider may have no leverage because it is contractually bound to carry the programming service. Further, providers do not always have leverage over programmers, regardless of the contractual situation. Popular programming services, and even niche services with established audiences, may have sufficient appeal with consumers that it is not a realistic option to drop them from the system.[7]

Moreover, in many cases, the program provider is legally prohibited from itself undertaking the captioning of the programming. Programming affiliation contracts typically contain a reservation clause clarifying that the program provider only obtains the rights specifically granted to it in the contract and that all other rights are reserved to the programmer.[8] TCI believes that none of its affiliation agreements grant it the specific right to caption programming. Thus, under these

---

[7] MPAA's statement that the Commission should simply "permit the programming contract negotiation process to allocate responsibility for ensuring that programs are captioned" is particularly naive for its failure to acknowledge any of the intricacies of the program negotiation process. MPAA Comments at 4.

[8] See Comments of Home Box Office at 26.

reservation clauses, TCI would be legally barred from captioning. Even if TCI were not legally barred from captioning the programming, however, it is not clear as a practical or technological matter whether it (or any other program provider) could caption a programming service where the programmer refused to caption at the source.

TCI recognizes that the Commission may view program providers as a convenient means of easing the administrative burden of enforcing the closed captioning requirements of Section 713. However, to the extent this conclusion is premised on the belief that providers may enforce captioning by simply refusing to carry a service that is not captioned, the Commission must make clear that the regulations it adopts preempt any inconsistent contractual language that prevents providers from dropping the service. As noted, failure to do so would put program providers in the untenable position of violating their programming contracts or violating the Commission's regulations.

III. THE COMMISSION SHOULD EXEMPT PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS PROGRAMMING FROM THE CLOSED CAPTIONING REQUIREMENTS.

TCI agrees with NCTA and other commenters urging the Commission to exempt public, educational, and governmental programming ("PEG") from the closed captioning rules.[9] As

[9] See, e.g., NCTA Comments at 24; Ameritech New Media Comments at 15-19; BellSouth Comments at 17; SBC Communications Comments at 5; U S West Comments at 3-8.

discussed below, requiring PEG programming to be captioned would impose very significant costs and could, in fact, eliminate the availability of much PEG programming. It is entirely possible that mandated captioning would not increase the amount of programming available to the hearing impaired, but would simply deny all subscribers access to such programming. Therefore, because the cost of captioning PEG programming would effectively eliminate any potential benefit, the Commission should exempt PEG as a class pursuant to section 713(d)(1).

Congress directed the Commission to consider a non-exclusive list of factors when considering section 713(d)(1) exemptions.[10] These factors demonstrate that PEG is a textbook example of the type of programming Congress intended to exempt under section 713(d)(1). This is so for essentially two reasons. First, the nature and cost of captioning PEG programming is substantial, because much PEG programming consists of unscripted interviews and discussions and is presented in live or lecture formats.[11]

---

[10] These factors include: "(1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner; (3) the financial resources of the program provider, distributor, or owner and the financial impact of the program; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; [and] (6) the non-profit status of the provider." House Report at 115.

[11] See Alliance for Community Media Comments at 4-5.

This would place PEG programming as among the most burdensome and difficult types of programming to caption. Second, because PEG programmers are typically non-profit and lack significant financial resources,[12] the impact of the substantial cost of captioning on the operations of PEG programmers could be the end of PEG access programming for all viewers.[13] To preserve PEG as a viable service to subscribers, the Commission should exempt PEG access programming from any closed captioning requirements adopted in this proceeding.

However, should the Commission decline to adopt a class exemption for PEG programming, it should also decline to adopt the suggestion of certain commenters that cable operators be required to fund PEG captioning.[14] Requiring cable operators to fund PEG captioning would arbitrarily increase the cost of providing cable service and would disadvantage cable operators vis-à-vis MVPDs without PEG obligations.[15]

---

12 See id. at 7 (PEG program producers typically "operate under financially constrained circumstances").

13 Id. at 8.

14 See, e.g., Alliance for Community Media Comments at 4-7; Southwest Cable Commission Comments at 3-6.

15 The Consumer Action Network and the National Association of the Deaf ("NASD") cite TCI's system in Fremont, California, in support of the proposition that the Commission should "require cable systems which carry PEG programming to set aside a fund for PEG captioning. . . ." NASD Comments at 13; see also Consumer Action Network Comments at 6. The reference to the Fremont system is inapposite and does not provide a basis for mandatory
(continued ...)

CONCLUSION

Based on the foregoing, TCI respectfully urges the Commission to adopt closed captioning rules consistent with the comments contained herein.

Respectfully submitted,

TELE-COMMUNICATIONS, INC.

Michael H. Hammer

Michael H. Hammer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

Its Attorneys

March 31, 1996

(... continued)
funding of PEG captioning by cable operators. The fund for captioning governmental programming in Fremont is operated by the city government and is used for captioning city counsel and school board meetings. TCI simply collects the per-month subscriber fee on behalf of the government's fund and does not underwrite the captioning service.

0031764.03